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Supreme Court of the United States

October Term 1968

No. 827

MALCOLM L. PINES,

Petitioner,

against

SAMUEL ZEMURRAY, DOROTHY DORSETT BROWN, Individually and as Executrix of the Estate of JOE W. BROWN, deceased, and JOSEPH MONTGOMERY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

JACOB RASSNER
Proctor for Petitioner

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Reasons for Granting the Writ	2
POINT I—The terms of the agreement were ambiguous and its construction was properly one for th jury	5
POINT II—Petitioner was entitled to a jury trial	11
The learned Court below was in error in failing to recognize that the applicable period of prescription was thirty years to title of the land and ten years as to an interest in the land	12
The subject matter of appellant's cause of action is an action *ex delicto* and an action *quasi ex contractu*	13
The nature of the relief to which petitioner was entitled was a matter for the jury's determination	17
The Court below was guilty of reversible error under well established and controlling law	17
POINT III—The learned Court below was in error in taking from the jury on to himself the decision of controversial issues of fact	18
POINT IV—The appellant was entitled to adduce proof in support of his cause of action for work, labor, services, materials furnished and monies expended which unduly enriched the respondents	19

PAGE

The Fifth and Fourteenth Amendments of the Constitution of the United States guarantee just and equitable compensation for services rendered and property taken under the concept of due process of law 20

CONCLUSION 21

Opinion of Court of Appeals 22

Opinion of Court of Appeals Denying Petition for Rehearing 23

Table of Cases Cited

Aetna Ins. Co. v. Neville G. Penrose Co., 304 F.2d 612 (5th Cir. 1962) 3n

Atlas Trading Corp. v. S. H. Grossman, Inc., 169 F.2d 240 (3 Cir. 1948) 3n

Aiken v. Ogilvie, 12 La. Ann. 353 13

American Heating & Plumbing Co. v. West End Country Club, 171 La. 482, 131 So. 466 13

Chapman v. Citizens' Bank of Louisiana, 31 La. Ann. 395 13

Dobson v. Masonite Corp., 359 F.2d 921 (1966).... 3n, 4, 10, 15, 16, 18

Da Ponte v. Ogden, 161 La. 378, 108 So. 777 (1926).. 13

Doll v. Albert Weiblen Marble & Granite Co., 207 La. 769, 22 So. 2d 59 21

Garland v. Scott's Estate, 15 La. Ann. 143 13

PAGE

Greenfield Box Co. v. Independence Veneer & Box Mfg. Co., 4 La. App. 690 13

Hayes v. Muller, 158 So. 2d 191 11

Hoffman v. American Mills Co., 288 F. 768 (2 Cir. 1923) 3n

Imboden v. Richardson, 15 La. Ann. 534 13

Interstate Trust & Banking Co. v. Alfano, App. 1919, Orleans No. 7557 13

Juneau et al. v. Laborde, 224 La. 672, 70 So. 2d 451.. 17

Le Bleu v. Savoie, 33 So. 729 15

Levin's Auction Exchange v. Samuels, 28 So. 2d 340 13

Little v. Haik, 163 So. 2d 558 11

Meyers v. Selznick Company, 373 F.2d 218 (1966) 2, 3, 4, 10

Monroe Auto Equipment Co. v. Heckethorn Mfg. & Supply Co., 214 F. Supp. 704, aff'd 332 F.2d 406, cert. den. 85 S. Ct. 160, 379 U.S. 888, 13 L. Ed. 2d 93 17

National Utilities Services, Inc. v. Whirlpool Corp., 325 F.2d 779 (2 Cir. 1963) 3n

Osborn v. Boeing Airplane Co., 309 F.2d 99 (9 Cir. 1962) 3n

Prudential Soc. v. Gondolf, App. 1917, Orleans No. 7169 13

Roussel v. Railways Realty Co., 165 La. 536, 115 So. 762 13

Succession of Savant, 15 La. App. 396, 132 So. 263.. 13

PAGE

United States for Use of Dixie Plumbing Supply Co. v. Taylor, 293 F.2d 717 (1961) 3n

Whitten v. Monkhouse, 29 So. 2d 801, amended as to interest, 213 La. 651; 35 So. 2d 418.....13, 20, 21

Statutes Cited

28 U.S.C. § 1254 (1) 1

CONSTITUTION OF THE UNITED STATES OF AMERICA:

Fifth Amendment 2, 5, 19, 20
Seventh Amendment 2, 3
Fourteenth Amendment 2, 5, 19, 20

LOUISIANA CIVIL CODE:

Article 2275 11
Article 3544 13
Article 3548 ..... 12, 13

Other Authorities Cited

Tulane Law Review, Vol. XXI, 1947, pp. 706, 707, 708, 709 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled action on August 16, 1968.

Opinion Below

The opinion below is reported at page 23.

Jurisdiction

The judgment of the Court of Appeals was entered on November 2, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Is the right to a trial by jury preserved by the Seventh Amendment of the United States Constitution where the controversy involves the question of whether a contract is one for the sale of real estate or one for work, labor, services and materials furnished?

2. Is an issue as to whether provisions of a Statute of Frauds have been complied with one which raises a question of fact for determination by a jury?

3. What is the correct principle of law that should prevail respecting fundamental constitutional rights where existing Federal cases are not reconcilable as observed by the Court of Appeals for the Second Circuit in the case of *Meyers* v. *Selznick Company*, 373 F. 2d 218 (1966) which treated with a question comparable to the one in the case at bar.

4. Does the defense of non-compliance with the provisions of a Statute of Frauds constitute a complete bar to recovery against one who fraudulently induced a contract for work, labor, services and materials furnished, and then breached the terms thereof? Would not such a holding be contrary to the very purpose and intent of a Statute of Frauds in violation of the Fifth and Fourteenth Amendments of the United States Constitution, which prohibit the procurement of services and materials without just compensation under principles of fairness and equity?

Reasons for Granting the Writ

1. A writ of certiorari is required in order to resolve and clarify a conflict in the decisions existing between the various Federal Courts. As a matter of fact, the Court of Appeals for the Second Circuit in the case of *Meyers* v.

Selznick Company, 373 F. 2d 218 (1966), in referring to such conflict, questions the fact as to whether "all the federal cases may not be reconcilable, * * *", and specifically refers to a number of decisions by various Circuit Courts of Appeal which are in conflict on the question involved herein.*

II. Petitioner's assignor was deprived of his right to a trial by jury guaranteed him by the Constitution of the United States, Seventh Amendment which is a matter of national importance.

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*Although all the federal cases may not be reconcilable, the clear weight of authority accords with sound principle in supporting the view we have articulated. In Hoffman v. American Mills Co., 288 F. 768, 772 (2 Cir. 1923), after first saying, "It is settled that the construction of written contracts whether embodied in a single instrument or in written correspondence, is a question of law for the court and not one of fact for the jury", this court went on to acknowledge that "While this is a general rule, it is likewise true that where the case turns upon proper conclusions to be drawn from a series of letters taken in connection with other facts and circumstances, it is one which may properly be left to the jury." More recently, in National Utilities Services, Inc. v. Whirlpool Corp., 325 F.2d 779 (2 Cir. 1963), we said that "The construction of a contract is for the court when its terms are unambiguous and there are no extrinsic facts to affect its construction." In two recent decisions the Fifth Circuit has disapproved the court's taking the interpretation of an ambiguous contract from the jury. United States for Use of Dixie Plumbing Supply Co. v. Taylor, 293 F.2d 717, 722 (1961); Dobson v. Masonite Corp., 359 F.2d 921 (1966). See also Aetna Ins. Co. v. Neville G. Penrose Co., 304 F.2d 612, 615-616 (5 Cir. 1962), and Atlas Trading Corp. v. S. H. Grossman, Inc., 169 F.2d 240, 245 (3 Cir. 1948). In another recent decision, Osborn v. Boeing Airplane Co., 309 F.2d 99, 103 (9 Cir. 1962), concerning the interpretation of an ambiguous expression in the Boeing Company's Suggestion Form, the court said that where "the existence and terms of a contract must be determined by drawing inferences of fact from all of the pertinent circumstances, and the possible inferences are conflicting, the choice is for the jury."

III. There is a conflict of decision by the Court below with its prior decision in the case of *Dobson* v. *Masonite Corporation* (5th Cir. 1966), 359 F. 2d 921 consisting of a radical departure from the principle then laid down by the said Court.

IV. A concept of law has been promulgated whereby a Trial Judge is vested with power to deny to a litigant his day in Court on the merits through the means of taking on to himself from a jury the question of interpreting and resolving issues as to the intent of parties to a contract.

V. The holding of the Court below in the instant case is in direct conflict with prior uniform holdings in the Fifth and other circuits that the interpretation of an agreement between parties always presents a question of fact, as precisely stated by the said Court in the *Dobson* case, *supra*, at page 923 as follows:

> "[3-5] But this of little assistance in determining *which type* of contract—sales or service—was here involved. This calls for an interpretation of the agreement between the parties to determine what they meant by the terms of that agreement. Interpretation is always a question of fact. Aetna Ins. Co. v. Neville G. Penrose, Inc., 304 F. 2d 612, 616 (5th Cir. 1962); 3 Corbin, Contracts, Section 554, p. 219 (1960); 17A C.J.S. Contracts §§ 616, 618, p. 1240 et seq. (1963)."

and also as recently as December, 1966, in the *Meyers* case, *supra*.

VI. If the decision by the Court below is not reversed, it would then grant to a Trial Judge power not heretofore authorized. This would enable a Trial Judge to dispose of factual issues as to whether or not the provisions of a Statute of Frauds had been literally and technically complied with, as a matter of law.

It is axiomatic that the intent of a Statute of Frauds is to prevent fraud. Intent is universally recognized as an issue of fact and never as a question of law.

VII. The provisions of the Fifth and Fourteenth Amendments of the United States Constitution are fundamental matters of national importance, the protection of which has been denied to the petitioner's assignor herein, who has spent over $1,000,000 and five years labor to the unjust enrichment of respondents herein.

POINT I

The terms of the agreement were ambiguous and its construction was properly one for the jury.

The terms of the agreement were ambiguous being based on oral and written memoranda.

Basically, the action was predicated on a claim for compensation for work, labor and services rendered by Sigmund Pines, petitioner's father and assignor, and an expenditure by him of over $1,000,000 over a period of five years in converting 5,200 acres of wasteland known as New Orleans Lakeshore Land Company Tract into a moderately priced residential area known as Pines Village.

Petitioner's attempt at recovery was frustrated by reason of the manner in which the compensation was to be paid; to wit, by the granting of certain options for the purchase of said tract by Sigmund Pines.

The terms for compensation were oral but, in addition thereto, there were certain portions of land conveyed in accordance with the oral contract and certain written memoranda executed by one of the respondents, the owner of the land, Samuel Zemurray.

Mr. Zemurray (now deceased) had granted certain options, some orally, some in writing, to Mr. Pines prior to the sale of said property to Mr. and Mrs. Joe W. Brown on December 9, 1954 (54).

Mr. Zemurray was not in the real estate business, he was the holder of the land in question as an investment (95).

In the interest of having the profit from the sale of the land in question taxed as a capital gain, Mr. Zemurray entered into an oral agreement with Mr. Pines sometime prior to April or May of 1950 (95, 97).

The substance of the agreement was that upon Mr. Pines succeeding in obtaining a ruling from the Internal Revenue Service that the profits of the sale would be considered as a capital gain, Mr. Pines would become the developer of the land in question, with the option to purchase the same at a price from $750.00 to $1,000.00 an acre (156).

Coryell McKinney, one of the Executors of the Estate of Samuel Zemurray, deceased (101), testified as follows (112, 113):

> ". . . It was Mr. Pines' proposition to get the land and if he would get the ruling Mr. Zemurray would sell him the land. That is what it was. There was no question of a fee about it.
>
> The Court: You mean Mr. Zemurray was just holding the land?
>
> The Witness: As an investment, the whole plot."

The agreement was for the sale of the entire tract, and not for a portion thereof. Mr. McKinney testified at page 114:

> ". . . Mr. Zemurray said, 'I don't want to sell the land because of the high tax bracket.' And Mr. Pines said, 'If I get you a capital gains ruling will you sell me the land.' Now, that's it."

* * *

"The Court: Is this the situation as you understand it. Mr. Zemurray was reluctant to sell this small acreage with some assurance that there would not be normal taxes?

The Witness: Mr. Zemurray was reluctant to sell small acreage because he was afraid that they would say it was ordinary income.

The Court: And, then, Mr. Pines said, 'Well, if I get the ruling will you sell me the land.'

The Witness: Substantially, that's it."

Mr. Pines obtained a favorable ruling involving the tract (108, 111).

The capital gain ruling was obtained in May, 1950 (158) as to part of the land. After getting the first ruling, Mr. Pines went to Washington and was assured by the Internal Revenue Department that the ruling obtained as to part of the tract would be applicable to the entire tract (177, 178).

The intent of the parties is expressed as follows (214):

"You, consciously, deliberately decided to forego any fee, as such, in the hope of realizing a profit on developing this land, didn't you? A. In April, 1950."

Mr. Zemurray did enter into written contracts of sale as to part of the land. In June, 1950, Mr. Zemurray, by written contract, sold section 19, consisting of 150 acres to Pines Construction Company (114) and gave written option to Mr. Pines of sections 20 through 24 (115).

Mr. Zemurray and Mr. Pines agreed to develop the entire tract (193).

The oral agreement called for the development of the entire tract exclusively by Mr. Pines so that there would be no question as to Mr. Zemurray remaining in the category of a landowner or investor and not as a developer. Mr. McKinney testified as follows at page 106:

"Q. Was there any conversation with respect to the need for Mr. Zemurray to maintain the status of investor and Mr. Pines to maintain the status of developer? A. Yes, Mr. Pines said Mr. Zemurray must be in the position of an investor and would have nothing to do with his company. He would be a developer."

All the discussions with relation to the tax question involved the entire tract and was not limited to a part thereof (150, 151). (Pines testimony.)

"Q. Now, if you can recall what was said, please tell us what was said, if not, give us the substance of the conversation then and there? A. Mr. Zemurray told me that his tract of ground, about 5,000 acres, was off the market. He was not interested in making any kind of a deal unless he had gotten a 25% tax bracket on any profit he would earn because he was in the 89% bracket at that time. He was a very wealthy man with great earning power."

* * *

"Q. Now, what, if anything, did you say, directed to that subject matter?"

* * *

"The Witness: I told Mr. Zemurray that I would make some kind of arrangement with him pertaining to this entire tract and that since the heart of his problem was getting a capital gains against the ordinary income earnings I would have to know all the facts pertaining to that particular problem before I could attack—."

Louis Goldstein, who testified that prior to his retirement he supervised the management and development of the New Orleans Lakeshore Land Company tract owned by Mr. Zemurray (141) corroborated Mr. Pines' contention, as shown by the following testimony at pages 144, 145:

"Q. Do you recall whether the question of capital gains ruling came up at that time? A. Not at

> that original conference at all. That developed later on when it was worked out that something could be done for Mr. Pines, giving him some of the land, and, then, it was during those conversations that Mr. Zemurray brought up the point, 'Well, I can't sell this land if it is going to be ordinary income. I wouldn't retain enough of the proceeds.' Finally, after all other matters had been apparently disposed of Mr. Zemurray said, 'Well, all right, I'll sell this land to you Mr. Pines providing I get a capital gains ruling. That there will be a ruling that this will be capital gains.' Mr. Pines, he said, 'Well, I'll undertake to get that ruling for you.' And, that was the way that originated. His introduction of that question of capital gains ruling from the Internal Revenue came up."

Mr. Zemurray provided written documents and other information to Mr. Pines in order to obtain the favorable tax ruling in having a test ruling as to 150 acres and an option as to 1,500 acres more (107, 155), and when the ruling was obtained, Mr. Zemurray reaffirmed the fact that he and Mr. Pines were dealing with the entire tract (155, 157, 159). As a matter of fact, Mr. McKinney testified that he was present at a meeting with Mr. Pines and Mr. Montgomery when a memorandum was drawn as to the entire tract but not signed (127, 128).

As a developer, pursuant to the terms of the oral agreement, confirmed in part by written agreements, Mr. Pines proceeded to do the following:

1. Obtained a ruling from the Internal Revenue Service that the profits from the sale of the property in question would be considered in the category of capital gain (95, 96, 106, 111, 113, 114, 144, 145, 204).

2. Spent and incurred obligations of vast sums (174, 216, 232, 233).

3. Obtained favorable zoning rulings from the City of New Orleans against great opposition, which required the

expenditure of a great deal of time (97, 107, 108, 181, 265, 279).

4. Held numerous conferences with various entities, including the Sewage and Water Board, some of the details as pointed out by the precise testimony of John J. Porte of the Water Department (157, 158, 161, 162, 163, 164, 178, 179, 277, 278, 323).

5. Arranged for sewage and water drainage, the cost of which in great measure was to be borne by the City of New Orleans (116, 117, 121, 146, 158, 169, 323, 324).

6. Provided for a pumping system to drain the land (314, 318).

7. Provided for fill (193).

8. Held many conferences with relation to the route of a contemplated highway, known as U.S. 11, wherein Mr. Zemurray cooperated by deeding a part of the tract to the Highway Department (262, 263, 264, 265, 278, 279, 289, 290).

9. Spent over $22,000 and arranged for the Maryland Casualty Company to spend approximately $21,960 for the purpose of having the Sewage and Water Board install a Force Main for sewage for the entire tract (169, 172, 270, 271, 316, 317, 318).

10. Arranged for proper elevation with the City of New Orleans authorities (193, 265).

Relegating the construction of ambiguous contracts to determination by a jury is a rule consistently followed in many Circuits, including the Fifth Circuit. *Dobson* and *Meyers* cases, *supra.*

POINT II

Petitioner was entitled to a jury trial.

The evidence established that a great deal of work, labor and services had been rendered over a period of five years entailing an expenditure of over $1,000,000 for which petitioner was seeking compensation and fulfillment pursuant to the terms of the agreement between the parties.

The Trial Court erroneously adopted the contention as set forth in support of Samuel Zemurray's motion for summary judgment dismissing the complaint, that no relief could be granted because there was no agreement in writing as required by Article 2275 of the Louisiana Civil Code, and as held in the cases of *Hayes* v. *Muller,* 158 So. 2d 191 and *Little* v. *Haik,* 163 So. 2d 558.

The court below affirmed the Trial Court's decision per curiam.

The error of the decision by the court below comes in clear focus when compared to the scholarly interpretation of the applicable law as dealt with in the Tulane Law Review, Vol. XXI, 1947, pp. 706, 707, 708, 709, from which excerpts are set forth in footnote.[2]

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[2] "It has been stated that the purpose of the requirement of a writing is to prevent the perpetration of fraud. See Jackson v. Harris, 18 La. App. 484, 489, 136 So. 166, 168, aff'd on rehearing 137 So. 655 (La. App. 1931). A verbal sale of an immovable is null unless actual delivery of the immovable has been made and the party against whom enforcement of the sale is attempted confesses it under oath. Art. 2275, La. Civil Code of 1870. However, if no objection is offered to the introduction of parol evidence to prove a verbal sale, the objection is considered waived and the sale is enforced. See In re Industrial Homestead Association, 198 So. 528, 531 (La. App. 1940). Normally, however, a verbal sale may be proved only by confession under oath or by answers to interrogatories. Art. 2275, La. Civil Code of 1870; Art. 354, La. Code of Practice of 1870; see Morgan v. Locke, 28 La. Ann. 806, 808 (1876); Note, 21 Tulane L. Rev. 286 (1946)." (pages 706, 707)

* * *

"The Louisiana courts have not required any particular form for a writing to meet the requirements of Article 2440. Richards v.

The learned Court below was in error in failing to recognize that the applicable period of prescription was thirty years to title of the land and ten years as to an interest in the land.

An action for title to land or accounting for profits therefrom is governed by Article 3548 of the Louisiana

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Nolan, 3 Mart. (N.S.) 336 (La. 1825); Saunders v. Bolden, 155 La. 136, 98 So. 867 (1923); See Sarpy, Form in Louisiana Contracts Involving Rights in Property, 14 Tulane L. Rev. 16, 23-25 (1939); accord, Restatement of Contracts (1932) § 207. Thus a receipt for all or part payment of the purchase price has been held to be sufficient. Richards v. Nolan, supra; Barfield v. Saunders, 116 La. 136, 40 So. 593 (1906); Guice v. Mason, 156 La. 201, 100 So. 397 (1924); see Cousin v. Schmidt, 143 La. 843, 850, 79 So. 427, 430 (1918); Courtney v. Ballard, 5 La. App. 754, 755 (1927)." (pages 707, 708)

* * *

"Where the writing contains a reasonably certain description of the land parol evidence is admissible to establish its identity. Walker v. Ferchaud, 210 La. 283, 26 So. (2d) 746 (1946); see Kernan v. Baham, 45 La. Ann. 799, 810, 13 So. 155, 159 (1893); Jackson v. Harris, 18 La. App. 484, 487, 489, 136 So. 166, 167, 169, aff'd on rehearing 137 So. 655 (La. App. 1931); cf. Young v. Guess & Swanson, 113 La. 230, 234, 38 So. 975, 976 (1905). Thus written identification by a well-known name is sufficient description. Phelan v. Wilson, 114 La. 813, 38 So. 570 (1905); Barfield v. Saunders, supra; Saunders v. Bolden, supra. Also, an informal description, such as 'a certain 80-acre tract of land laying broadside with the 160-acre tract that he now lives on,' is sufficient. See Guice v. Mason, 156 La. 201, 204, 100 So. 397, 398 (1924)." (page 708)

* * *

"Apparently it is not necessary that the writing recite the full amount of the purchase price, because a receipt for part of the purchase which did not mention the full amount has been held to meet the requirements of Articles 2275 and 2440. Guice v. Mason, supra; see Cousin v. Schmidt, 143 La. 843, 846, 850, 79 So. 427, 428, 430 (1918)." (pages 708, 709)

* * *

"However, letters written by the purported vendor have been held to be sufficient evidence in writing to prove the sale of an immovable. Bair v. Abrams, 12 La. Ann. 753 (1957); Da Ponte v. Ogden, 161 La. 378, 108 So. 777 (1926). Thus by the admission in evidence of letters the same result is reached as would be obtained under the doctrine of "beginning of proof." (page 709)

Civil Code, which has a thirty year period of prescription. See *Da Ponte* v. *Ogden, supra.*

An action for an interest in land is a personal action which is governed by Article 3544 of the Louisiana Civil Code, which has a prescription period of ten years. See *Da Ponte* v. *Ogden, supra; Chapman* v. *Citizens' Bank of Louisiana,* 31 La. Ann. 395; *Aiken* v. *Ogilvie,* 12 La. Ann. 353; *Whitten* v. *Monkhouse, supra; Interstate Trust & Banking Co.* v. *Alfano,* App. 1919, Orleans No. 7557; *Prudential Soc.* v. *Gondolf,* App. 1917, Orleans No. 7169; *Garland* v. *Scott's Estate,* 15 La. Ann. 143; *Imboden* v. *Richardson,* 15 La. Ann. 534; *Succession of Savant,* 15 La. App. 396, 132 So. 263; *Roussel* v. *Railways Realty Co.,* 165 La. 536, 115 So. 762; *Greenfield Box Co.* v. *Independence Veneer & Box Mfg. Co.,* 4 La. App. 690; *Levin's Auction Exchange* v. *Samuels,* 28 So. 2d 340; *American Heating & Plumbing Co.* v. *West End Country Club,* 171 La. 482, 131 So. 466.

The subject matter of appellant's cause of action is an action *ex delicto* and an action *quasi ex contractu.*

Sigmund Pines and the late Samuel Zemurray entered into the following arrangement which was established by the evidence beyond any question of doubt:

1. To enter into a business venture whereby Mr. Zemurray would legally retain the status of an investor entitling him to declare any profits from the sale of the land in question on the basis of capital gains.

2. Sigmund Pines was to prepare and present to the Internal Revenue Service a proposal as to the contemplated venture by Mr. Zemurray and Mr. Pines in order to obtain a ruling before the venture was started, assuring Mr. Zemurray that he would legally retain the right to have profits from the sale of the land classified as capital gains.

3. Various writings, plans and written evidences supporting the same were provided by Mr. Zemurray to Mr. Pines in aid of obtaining the aforesaid ruling, which ruling was a condition precedent to an undertaking by Mr. Pines as a developer of the land in question.

4. The aforesaid documents constitute written evidence justifying parole evidence to explain the purpose and intent of said documents.

5. Mr. Zemurray agreed that Mr. Pines would become the owner of the tract of 5,200 acres at a price which would be fixed at between $750 and $1,000 an acre.

In the light of the foregoing facts, it was for the jury to determine whether the undertaking by Mr. Zemurray and Mr. Pines constituted adequate factual proof within the legal concept of Louisiana law and factually measured up to any of the following, jointly or severally:

a. The undertaking for work, labor and professional services in the furtherance of obtaining a definite ruling from Internal Revenue Service as to make the entire undertaking advantageous to Mr. Zemurray and profitable to Mr. Pines.

b. As to whether the undertaking came within the category of an agreement for work, labor and services in an undertaking to develop the land.

c. As to a contract for the sale of land, factually within the frame work of the Louisiana applicable and controlling statute.

d. As to a contract of option to purchase the land, within the frame work of Louisiana applicable and controlling statute.

e. As to whether the fact that the agreement called for professional accounting service in preparing and presenting the course of procedure assuring the legal right to Mr.

Zemurray of substantial tax benefits; work, labor and services by Mr. Pines as a developer of the land in question; conferences with governmental and civil interests so as to make the undertaking feasable; clearing, draining and installing various facilities, as well as obtaining water and sewerage facilities; obtaining advantageous access by way of highway and otherwise to the land in question; expending large sums of money and spending a great deal of time and effort in the furtherance of the conversion plan, so as to drain, grade and otherwise benefit and improve the land so that it would be converted from barren and swamp land into dwelling and building sites.

In the light of the overall intent of the parties partaking of interests in both movable and immovable property, work, labor and services and activity in the nature of a joint venture, it is respectfully submitted that a prima facie case was established, entitling appellant to the right of a jury trial.

Put another way, it was for the jury to decide what the relationship was between the parties relative to the undertaking. See *Dobson, supra.*

In the light of the testimony, particularly the charge that Mr. Pines was being used by Mr. Zemurray "strictly as a fence to develop—" (208), for the purpose of making certain that Zemurray would be kept within the legal category of an investor, parol evidence was clearly admissible to show the fraud or error in the case.

Le Bleu v. *Savoie*, 33 So. 729.

As appears from the foregoing review of the facts, Sigmund Pines established that he had rendered five years of services and spent over $1,000,000 which Samuel Zemurray accepted and, accordingly, a cause of action was clearly established either on the basis of a contract for sales or services or both, and accordingly, Sigmund Pines

was entitled as a matter of right and in accordance with the law as laid down by this Honorable Court, to a trial by jury.

The Court below was guilty of further error in totally disregarding its own prior decision in *Dobson* v. *Masonite Corporation, supra,* where it held that the terms of an agreement involving sales or services constitute issues of fact to be decided by a Jury and not to be determined by the Court as questions of law.

As a matter of fact, the Trial Court, prior to the dismissal of the action, had stated that a Jury question had been presented.

The Court below stated that the following contention presented a question of fact to be decided by the jury (208).

> "Of course, I came to the conclusion that Mr. Zemurray used me strictly as a fence to develop. He did not ever intend to go through with his agreement. I found that out in April, 1954 much to my regret, but I would never have made any agreement with Mr. Zemurray under—
>
> Mr. McCall: Your Honor, I would ask that the latter part of the witness' answer be stricken as not responsive.
>
> The Court: No. It is in the record. I would like to know what he means by a fence.
>
> The Witness: I was doing the developing. Mr. Zemurray could not touch a spade into the ground. If he did he would go right back into the 89% bracket. It turned out later that he never intended to go through with his agreement, that he was using me strictly to obtain the capital gains ruling because if he procured the sewerage, for instance, he would never get the gains ruling. They would throw him right in as a real estate operator. The Revenue Code is very specific about that.
>
> The Court: The jury will disregard the witness' statement that Mr. Zemurray never did intend to go through with the deal.
>
> That's for the jury to decide."

The nature of the relief to which petitioner was entitled was a matter for the jury's determination.

Insofar as the case may have presented mixed questions of law and fact, the jury should have been instructed as to the line of demarcation between law and fact.

In the case of *Juneau, et al.* v. *Laborde,* 224 La. 672, 70 So. 2d 451, the Court held at page 681:

> "[2] This Court has held that where certain relief is not specifically prayed for but the special matter is specifically alleged, a prayer for general and equitable relief will suffice. In Stanga v. Lake Superior Piling Co., 214 La. 237, 36 So. 2d 778, 780, the Court stated: 'True, as defense counsel point out, plaintiff did not specifically pray for this relief; but his allegations covered it and he prayed for general and equitable relief, all of which, we think, sufficed. As held in Kinder v. Scharff, 125 La. 594, 51 So. 654, under a prayer for general relief, suited to the nature and justice of the case, the court may render such judgment as would be given in a new suit, to avoid circuity of action.'"

Although there is a right to jury trial on factual questions involved in legal issues, the trial court must distinguish between questions of fact and questions of law. *Monroe Auto Equipment Co.* v. *Heckethorn Mfg. & Supply Co.,* 214 F. Supp. 704, affirmed 332 F. 2d 406, cert. denied 85 S. Ct. 160, 379 U.S. 888, 13 L. Ed. 2d 93.

The Court below was guilty of reversible error under well established and controlling law.

No one can deny that a basic question involved the service of Sigmund Pines and the question as to whether or not he was entitled to an option to purchase the land under the prevailing circumstances.

In the light of the fact that the learned Court below failed to be guided by the decision of this Honorable Court, as clearly set forth as recently as April 26, 1966, in the case of *Dobson* v. *Masonite Corporation,* 359 F. 2d 921, rehearing denied June 17, 1966 appellant is clearly entitled to a reversal and a new trial, as previously quoted:

> "[3-5] But this of little assistance in determining *which type* of contract—sales or service—was here involved. This calls for an interpretation of the agreement between the parties to determine what they meant by the terms of that agreement. Interpretation is always a question of fact. Aetna Ins. Co. v. Neville G. Penrose, Inc., 304 F. 2d 612, 616 (5th Cir. 1962); 3 Corbin, Contracts, Section 554, p. 219 (1960); 17A C.J.S. Contracts §§ 616, 618, p. 1240 et seq. (1963)."

POINT III

The learned Court below was in error in taking from the jury on to himself the decision of controversial issues of fact.

In the furtherance of his plan and scheme to defraud Sigmund Pines of just compensation, Samuel Zemurray through legal jugglery of the true meaning and purposes of the Statute of Frauds and by conniving with the late Joe W. Brown and his associates, entered into sales agreements in violation of his agreement with Sigmund Pines.

POINT IV

The appellant was entitled to adduce proof in support of his cause of action for work, labor, services, materials furnished and monies expended which unduly enriched the respondents.

The Trial Court was in error in depriving appellant of adducing proof of reasonable value of his work, labor, services, materials furnished and monies disbursed and expended in the development of the tract of land in question.

The subject matter of this cause of action of appellant is an action *ex delicto* and an action *quasi ex contractu.*

The appellant is entitled to just compensation for his work, labor, services, materials furnished and monies expended in the development of a tract of land. His right to compensation comes within the purview of protection vouchsafed by the Fifth and Fourteenth Amendments of the United States Constitution which prohibit the deprivation of an individual of his services and materials furnished by him without just compensation to the benefit and enrichment of another.

This principle of unjust enrichment and undue deprivation contained in the said Amendments invokes both the principles of fairness and equity and should be enforced by the Courts as a matter of justice.

The refusal of a Court to permit the jury to determine whether appellant had established his case for just compensation for the items mentioned is a violation of the due process clauses contained in the Fifth and Fourteenth Amendments and prevented appellant from any form of recovery for any of the work, labor, services, material furnished and monies expended on and in connection with the development of the tract of land belonging to respondents pursuant to the agreement between the parties.

The Fifth and Fourteenth Amendments of the Constitution of the United States guarantee just and equitable compensation for services rendered and property taken under the concept of due process of law.

The professional services of Sigmund Pines, his knowledge as to the method of presentation of a contemplated undertaking which would meet with the approval of Government authorities; his spending years of time and effort and vast sums of money in converting land which was practically valueless, under circumstances which required professional knowledge lest Mr. Zemurray lose his status as an investor; and, in addition, holding many conferences and obtaining favorable cooperation and financial aid from municipal authorities, constitute a basis for just, legal and equitable compensation.

It would be repugnant to the basic concept of American justice to permit anyone, particularly a person who requested the services to get the benefit thereof and escape any obligation to pay therefor on some flimsy, technical and unconscionable ground.

It would be just as unconscionable to permit the purchasers of the land to obtain millions of dollars in tax benefits and profits of the land who, with full knowledge of Mr. Pines' relationship to the development project, entered into an agreement with Mr. Zemurray calculated to deprive Sigmund Pines of the benefits of his efforts for their own unjust benefit and enrichment.

In the case of *Whitten* v. *Monkhouse,* 29 So. 2d 801 (amended as to interest, 213 La. 651; 35 So. 2d 418), the Court held as follows at page 808:

> "[7, 8] The distinction with regard to the prescriptive periods as between actions ex delicto and actions which are both ex delicto and quasi ex contracu is aptly and plainly made in the case of Prudential Savings & Homestead Society v. Gondolf,

No. 7169, Court of Appeal, Orleans Parish, Teissier's Digest, p. 142. See Louisiana and Southern Digest, as follows:

* * *

"Where the unlawful act of one person not only damages another, but also enriches the wrongdoer, there arises an action both ex delicto and quasi ex contractu and the action to recover the unlawful gain is barred by the prescription in ten years."

In the case of *Doll* v. *Albert Weiblen Marble & Granite Co.*, 207 La. 769, 22 So. 2d 59, the Court held at page 773:

"[1-3] We do not think this case presents factual issues controlled by Article 2991 of the Revised Civil Code, but, rather, that it is governed by the jurisprudence of the courts of this state to the effect that where one employs the services of another without specifying what compensation will be paid therefor, or where one avails himself of the services of another in the performance of a task, he is bound to compensate the person so employed or who performs such a service. (Cases cited.) This jurisprudence is founded on the moral maxim of the law that no one ought to enrich himself at the expense of another. Article 1965 of the Revised Civil Code."

CONCLUSION

Petitioner respectfully submits that the questions presented come within the concept meriting the granting of the petition for a writ of certiorari.

Respectfully submitted,

JACOB RASSNER
Proctor for Petitioner

Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23194

MALCOLM L. PINES,

Appellant,

versus

SAMUEL ZEMURRAY, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(November 2, 1967)

Before JONES and GODBOLD, *Circuit Judges,* and SCOTT, *District Judge.*

Per Curiam: After testimony in this cause had been taken before the district court on behalf of the plaintiff, who is the appellant here, a judgment was directed for the defendant. Federal jurisdiction was based on diversity of citizenship and the right of recovery was controlled by the law of Louisiana. The district court, having considered the facts disclosed by the evidence and the law of the State of Louisiana, concluded that the appellant had failed to carry the burden of proof and failed to establish his case. It is the opinion of this Court that no other conclusion could properly have been made. Therefore, the judgment of the district court is

AFFIRMED.

Opinion of Court of Appeals Denying Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23194

MALCOLM L. PINES,

Appellant,

v.

SAMUEL ZEMURRAY, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(August 16, 1968)

Before JONES and GODBOLD, *Circuit Judges,* and SCOTT, *District Judge.*

Per Curiam: The Petition for Rehearing is DENIED, and no member of this panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.